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Digest of Recent Opinions

ATTORNEY and CLIENT—Investment—Accounting.

New Jersey Court of Errors and Appeals

vs. Watson

Argued, 1935

Before Appellant: L. Edward Hermann and Ralph W. Emerson

For Respondent: Dougal Herr and William A. Kaufman

On appeal from the Court of Chancery. Reversed.

The appellant, Daly, filed a bill of complaint against the appellee alleging that in 1926 she was a woman of seventy years of age, unfamiliar with business, and relying entirely upon the defendant, entrusted the defendant, an attorney and counsellor at law, the sum of $3000 which she desired to invest in a good, first mortgage; that the defendant promised her of an opportunity to purchase a first mortgage on property in North Bergen, consisting of two lots with a house erected thereon; that accordingly she agreed to loan the money and forwarded it to the defendant who took a mortgage on the property in the name of the complainant; that the defendant kept the bond and mortgage and collected the interest for the complainant up to and including October 1st, 1931. In November, 1931, complainant requested defendant to inform her of the status of the property with respect to unpaid taxes, but he did not comply with her request; whereupon, she investigated and found that there was not a house erected upon the premises, as represented by the complainant, but an old worthless, abandoned shed, which had been previously used as a cheese factory. She also learned that street improvements had been made prior to the date of the mortgage, about which she had not been informed and that taxes from the years 1927 to 1931 inclusive had not been paid. That on June 26, 1929, the premises had been sold for non-payment of taxes and assessments for $2154.90, none of which she was informed. She demanded that defendant restore her but he refused. The bill prays that the defendant be decreed to be a trustee for complainant with respect to this investment and that he be required to account.

The defendant below moved to dismiss the bill on the ground that the allegations thereof are lacking in definiteness, clarity, certainty, particularity and reasonable fullness, on the further ground that the complainant has an adequate remedy at law." The bill was stricken and the complainant appeals.

Held, that the bill, although it did not plead the cause of action with the desired particularity, sufficiently stated a cause of action cognizable in equity and entitled the complainant to a hearing; that "there was a charge of failure to disclose by the complainant certain facts material to the investment, and as was said in *Turnley vs. Nixon*, 112, N. J. Eq.:

"The failure of the defendant to disclose fully the facts and circumstances surrounding his transaction in connection with this mortgage was fraudulent and so far as the legal effect is concerned in this case it is immaterial whether it was actual or constructive fraud.

"Where a cause of action is cognizable in equity. It is a suit for an account by a cestui que against a trustee alleging improper conduct as trustee. Davis vs. Davis, supra, 87). Turnley vs. Nixon, supra. This is not a suit for negligence in

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Laws of 1935

(Continued from previous issue)

(Effective dates follow each act)

CHAPTER 183. (May 7, 1935) Repeals P. L. 1931, p. 563, Chapter 224, as to number of commissioners in cities having more than 10,000 population.

CHAPTER 184. (May 14, 1935) Showing of dogs with cropped ears owned by non-residents permitted, providing cropping occurred prior to effective date of this act.

CHAPTER 185. (May 15, 1935) Permits domestic casualty insurance companies to issue policies covering aircraft damage and elevator risks.

CHAPTER 186. (May 15, 1935) Permits Port of New York authorities to pay damages for change in street grade.

CHAPTER 187. (May 15, 1935) Permits trust companies holding its own stock as collateral security for loans to hold same beyond period of one year with the approval of the Commissioner of Banking and Insurance.

CHAPTER 188. (May 15, 1935) Permits state banks holding its own stock as collateral security for loans to hold same beyond period of one year with the approval of the Commissioner of Banking and Insurance.

CHAPTER 189. (May 15, 1935) Creates a banking advisory board in the Department of Banking and Insurance and defines the powers of said board.

CHAPTER 190. (May 15, 1935) Municipalities under control of Municipal Finance Commission permitted to file a petition in

(Continued on page 2, col. 2)

Recent Case Comment

By ALFRED C. CLAPP

Wills—Vesting of Future Estates

In re Clark 13 N. J. Misc. 303. Testator here left all his estate, real and personal, in trust to pay the income to his wife during the minority of their children (with the "desire that the children should be liberally educated and properly maintained during their minority") and "when and as soon as" each child should attain the age of twenty-one, such child was to receive a share of the income pro rata with his mother; and "when" the eldest child attained the age of thirty, then the estate was to be divided equally among the wife and children; retaining in trust the share of such child as shall not have attained thirty, until he shall have attained that age. If any of the children should die leaving surviving "children", before the estate is distributed, the "heirs" (meaning "children" Dawson v. Schaeffer 52 N. J. Eq. 341, 30 At. 91 affd. on opinion 53 N. J. Eq. 238, 34 At. 1135) of the child so deceased should take their parent's share. Testator died leaving a wife and two children, Herberton and Isabelle; and Herberton died at fourteen years of age. The question for the court was whether the remainder interest of Herberton in the principal of the estate was contingent or whether it vested and passed to Herberton's estate.

The court held the gift of principal to be contingent (1) because (citing *Post v. Herbert's Executors* 27 N. J. Eq. 540, E. & A. Beasley C. J.—the only New Jersey case cited) the principal could be only divided and paid in the future "when" the eldest became thirty. (2) because there was no fixed intermediate gift to each child, of income from

(Continued on page 4, col. 2)

Current Decisions

MUNICIPAL CORPORATION — Zoning Ordinance Adoption — Validity—Failure to Provide—Board of Adjustment.

New Jersey Court of Errors and Appeals

Thomas F. Somers, Jr., Trustee under the last Will and Testament of Thomas F. Somers, Deceased, vs. The Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr., Bernard V. Poland and John Rogers, Board of Commissioners; and William P. Megill, Inspector of Buildings

On Mandamus

Decided May 17, 1935

For Realtor-Appellant: Lionel P. Kristeller

For Respondents: Joseph R. Megill

The opinion of the court was delivered by Justice Case.

The appeal is from a judgment of the Supreme Court in a mandamus proceeding wherein that court, on the bringing on of the matter for oral argument at the January, 1935, term, forthwith overruled a demurrer to the return and dismissed, without opinion, the alernative writ theretofore allowed the appellant. The summary action of the Supreme Court seems not to have been in the exercise of its discretionary control of prerogative writs or upon a factual determination that the uses now and heretofore made of the land in question and of other lands in the neighborhood do not merit a statutory "special exception" hereinafter mentioned, but, as represented to us without contradiction, for the purpose of having the meritorious question, which we assume to be of law, brought promptly to us for review.

Appellant desires to erect a gasoline and oil filling station on a plot of land owned by him at the southwest corner of Ocean and Fifth Avenues in the Borough of Bradley Beach and seeks an appropriate building permit. The writ was directed to the Board of Commissioners and the inspector of buildings and required them to issue the permit or to signify cause to the contrary.

The facts against which the demurrer ran were stipulated to the court below as an agreed special case. It appears in part:—

In January, 1920, the borough passed a building ordinance whereby the issuing of a municipal permit became a preliminary essential to the erection, alteration or repair of a

(Continued on page 3, col. 1)

NIRA and Frazier-Lemke Act Unconstitutional

In a unanimous decision rendered in the case of Schechter vs. United States of America and United States of America vs. A. L. A. Schechter Poultry Corporation on May 27, 1935, the United States Supreme Court held that the NIRA was unconstitutional in so far as it provides for adoption of codes of fair competition, in that it delegated legislative power to the President, and further that such act cannot regulate intrastate commerce, where the effect of such transactions upon interstate commerce is indirect. The opinion was delivered by the Chief Justice.

In another unanimous opinion, in the case of Joint Stock Land Bank vs. Radford the sub section S of section 75 of the Bankruptcy Act commonly known as the "Frazier-Lemke Act" was held unconstitutional as being in violation of the due process clause of the Fifth Amendment of the United States Constitution. The opinion was delivered by Mr. Justice Brandeis.

Public Defenders in Criminal Cases

By MAYER C. GOLDMAN*

I shall discuss in this article, the subject of "Public Defenders in Criminal Cases" from two viewpoints:

1. Public Defenders for the *poor* in criminal cases.
2. Compulsory State defense for *all* accused persons.

"Justice", said Daniel Webster, "is the great concern of man on earth".

In this country, the administration of criminal justice has signally failed. There is no true "equality before the law" between rich and poor. It is urgent that there be a "New Deal" in our entire criminal system.

1. Public Defenders for the Poor in Criminal Cases

There is an insistent and overwhelming public demand in this country today for social and economic justice. Society owes a duty to the "under-dog". Elemental justice in this country is constantly denied. The poor in the criminal courts too frequently are the victims of their own poverty, while the gangster and "criminal rich" too often escape merited punishment. It is easy to convict a poor man. It is becoming increasingly difficult to convict those of powerful financial influence.

There should be "free justice" to *all*. Not the kind of "free" justice which is meted out only to the poor, but the kind that does not pauperize anyone, since it is the portion of everyone.

To compel poor people who want justice and only justice, to seek charity to protect their legal rights, is not only tragic, but most degrading. That incites them to denounce the courts and to show disrespect for organized government.

One of the signs of unrest today is the rapidly growing movement for a "square deal" in the courts. In this connection, the office of Public Defender has been persistently urged. The State should shield the innocent and punish the guilty, especially the killers, kidnappers and racketeers, despite their privately retained unscrupulous lawyers. The innocent must be protected by competent counsel.

Despite our so-called "presumption of innocence," society as a whole does not presume the accused innocent. It presumes him guilty. If the phrase "equality before the law" has any real significance, all classes of accused persons, rich or poor, must be given equal resources and equal rights.

The successful operation of the office of Public Defender in Chicago, and in Los Angeles, San Francisco and Alameda Counties, California, and in all the 8 Counties in Connecticut, call attention to the need for the establishment of Public Defenders by law throughout the country.

The District Attorney's or Prosecutor's principal function is to prosecute and not defend. It is impossible for him adequately, to perform the double role, even though he conscientiously attempts to do so. The popular impression, that many defendants are persecuted rather than prosecuted, is not without reason. While there are many fair prosecutors with a keen sense of justice, unfortunately, too many of them are dominated by the desire to "make a record." The average prosecutor scents guilt, not innocence. The tendency of many prosecutors—and even of many Judges—to seek convictions, by fair means or otherwise, has been frequently commented upon by the Appellate Courts. The law reports and the daily press, abound with criticisms directed against overzealous and ambitious prosecutors "who run dangerous, foolish and unprofessional risks to secure a conviction" and who often evince "ignorance of the ordinary rules of evidence or disregard the interests of both the people and the defendant x x x" (*People vs. Cascone*, 185 *N. Y., p.* 334.

In a recent case in the New York Court of General Sessions, the trial Judge was severely criticized by the Appellate Division because

> *"The Court emphasized every circumstance in the case which was relied on by the prosecution as indicating guilt on the part of the defendant".*
>
> The Court also said in that case:
>
> "Many other instances might be pointed out wherein the Court's rulings *were entirely favorable to the prosecution and where the rights of the defendant have been ignored".*

The vice of the "assigned" counsel system generally used in the United States, is too well known, to require elaborate discussion. It is sufficient to say that this system has been a source of constant criticism and attack for many years. It is evidently wrong from every standpoint. It is as unfair to counsel as it is to the accused. Accused persons are entitled to a real defense, not a perfunctory one. Even a "crook" is entitled to a fair trial. Any person charged with crime is entitled to competent counsel. He should have every facility and resource to produce the law or the

(Continued on page 2, col. 3)

United States Supreme Court

Abstracts of Decisions

BANKS — Deposits — Payment of Check—Right of Payee Bank to Hold Endorser Where No Notice is Given.

The H. D. Company had a deposit account with the Central Bank and drew five checks against the account and cashed them at the Ashland Bank. Four of these checks, endorsed by the Ashland Bank were deposited by the said bank with the Reserve Bank for collection on Saturday, April 23 and on Monday morning, April 25th were received at the Clearing House. The fifth check was also duly endorsed and deposited with the First National Bank.

A rule of the clearing house provided that "Notice of non payment of * * * items, drawn on banks * * * which * * * are affiliated with members of the association * * * be given by telephone before two thirty o'clock (2:30 p. m.) of the same day to the member banks presenting such items through the clearing house."

The Federal Reserve and First National Bank were members, none of the other banks were.

On Monday, April 25, the Central Bank settled its balance at the Clearing house and received the checks and later learned that the H. D. Co. lacked funds to meet payment. On the same day the First National Bank charged the fifth check against the Central Bank, where it was received and retained.

On April 26, the Central Bank returned the five checks to the Ashland Bank and demanded reimbursement which was refused. The Central Bank did not give notice to the Fed-

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Medico-Legal Aspects of Benzol Poisoning

MAX KUMMEL, M. D.

In the spring of 1929, there appeared at my office a pale looking young man who complained of severe headache, nose bleeds, general weakness and inability to work. He was the victim of an unusual accident. Several months previous another worker and he were ordered by the foreman to go down into a tank to clean it; both were quickly overcome by Benzol fumes and dropped unconscious. His father-in-law and a fellow worker were sent to rescue them. They made an attempt to lift them, became asphyxiated and succumbed on the spot.

The occurrence of thirteen cases of fatal Benzol poisoning in the year 1927 in New Jersey called attention to its widespread occupational hazard. While the exact number of chronic sufferers of this poisoning is unknown, it can be surmised from the fact that over 100 claims for compensation were filed at first time. A corporation interested in safeguarding the use of Benzol conducted an intense propaganda minimizing the effects of the deadly poison and casting aspersions on the sufferers and their attorneys. However, upon a visit in 1931 to the University Hospital of my Alma Mater, the Ohio State University, Columbus, Ohio, I saw a Benzol victim who had been confined there continuously for four years. He had been under the care of Prof. Emory H. Hayhurst whose thorough knowledge of the disease and extensive experience in its treatment is universally acknowledged. This man was given all the benefits of modern science under the doctor's expert care—rest, diet, medication, liver therepy and almost weekly blood transfusions — but without improvement.

Industry uses Benzol in the form of "crude Benzol" or Solvent Naptha or its homologues and derivatives, particularly Toloul and Xylol. It is used in the manufacturing of rubber and artificial leather. It is also used in paints for quick drying and as a paint and varnish remover. An idea of the toxicity of Benzol may be obtained from the following cases:

1. Girl of 14 worked in the coating room of a tin can factory for five month—suffered from hemorrhages in all organs. Died.
2. Girl of 14 worked for three months—suffered from abdominal pain, vomiting, headaches, anemia and fainting spells.
3. Girl of 17 worked for six weeks in "dope room"—headaches, spots on arms and legs, followed by hemorrhages. Died.
4. Girl of 15, worked on can tops in can factory, after three days suffered nose bleeds and a week later hemorrhages.
5. Man of 33, worked in tire-building department for a year, developed hemorrhages, anemia and died in convulsions.
6. Man of 40, worked 11-12 months in tire-building department, developed weakness, difficulty in breathing, nose bleeds followed by coma and death.

The general or secondary effects of Benzol Poisoning may not differ from those of the other industrial poisonings, but the effect on the blood is entirely different. It attacks not only the blood cells but actually destroys the blood forming organs thus preventing their regeneration and restoration to health. So while the other types of industrial poisoning present a picture of secondary anemia with the reduction of the hemoglobin and destruction and simultaneous regeneration of the red-blood-cells, Benzol produces a picture of primary aplastic anemia and leucopenia. The white cell count and hemoglobin come down very low and the red-blood-cells are reduced but not in the same proportion.

If the patient does not die in the acute stage, permanent incapacity may result from the primary effect of the destruction of the cells and blood-forming-organs as manifested by anemia and its accompanying symptoms of pallor, headaches, dizziness, hemorrhages and gastro-intestinal disturbances. Permanent disability may on the other hand be produced by the effects on the Central Nervous System which may manifest itself in the form of tremors, spasms, physical and mental instability, psycho-neurosis, delirium and convulsions.

For the attorney to prevail in a case of Benzol Poisoning or that of its dedivatives or homologues, he must present proof of:

1. History of exposure to Benzol or its derivatives or homologues;
2. Clinical History of the poisoning particularly pallor, headache and purpuric spots;
3. Blood Picture—Aplastic anemia, leucopenia with relative to lymphocytosis and eosinophilia;
4. Knowledge of repondent during employment or written notice within five months;
5. Extent of permanent disability and its casual relation to Benzol exposure.

Laws of 1935

(Continued from page 1)

bankruptcy provided the approval of the Municipal Finance Commission is first had and obtained in writing; readjustments likewise to be approved.

CHAPTER 191. (May 15, 1935) Municipal Finance Commission authorized to request Supreme Court to determine rights of creditors to municipal funds as are available for debts.

CHAPTER 192. (May 15, 1935) permits Municipal Finance Commission to refund all outstanding bonds and notes of municipalities under its control.

CHAPTER 193. (May 15, 1935) Any county, municipality, school district or other political subdivision shall have the power to file a petition in bankruptcy if duly authorized, provided approval is first had of Municipal Finance Commission, readjustments likewise to be approved.

CHAPTER 194. (May 15, 1935) Municipalities under control of Municipal Finance Commission granted an extension for payments for improvement assessments.

CHAPTER 195. (July 1, 1935) Municipal Finance Commission in control of a municipality permitted to certify to school districts resolutions providing for the funding and refunding of indebtedness of said school districts.

CHAPTER 196. (July 4, 1935) Relieves trust companies of providing security for deposits where such deposits have been insured by the Federal Deposit Insurance Corporation.

CHAPTER 197. (July 4, 1935) Relieves state banks of providing security for deposits where such deposits have been insured by the Federal Deposit Insurance Corporation.

CHAPTER 198. (May 15, 1935) Appropriation of $62,500.00 granted for engineering and architect's fees on armory construction.

(To be continued next week)

Public Defenders in Criminal Cases

(Continued from page 1)

facts bearing upon the question of his guilt or innocence.

Assigned lawyers are usually required to serve without compensation except in capital cases. Logically, there is no more reason for compensating counsel defending persons on trial for their lives, than to pay counsel in cases where only liberty or reputations are involved. Even if the accused is fortunate enough to have a competent lawyer assigned to him, it must be obvious that with the best skill and effort, that he cannot cope with the power, strength and resources of the prosecution. He has no money available to pay the expense of witnesses, fees of experts and to take appeals. Frequently, defendants are compelled to suffer, not because they are guilty, but because they are poor. *The recent Hauptmann murder trial* at Flemington, N. J., cost the State $1,000 a day for the expenses of the trial alone, according to Attorney General Wilentz's statements to the press. What individual defendant could stand such a financial burden and what a grave injustice might be done by his inability to do so in the case of an innocent defendant.

Despite the opposition of lawyers, District Attorneys and Judges and their persistent attitude that the accused is always amply safeguarded under our law and that the conviction of an innocent person is impossible, the fact remains that striking instances of miscarriages of justice are constantly brought to public notice. Space will not permit a detailed discussion of many outstanding instances of wrongful convictions, but a book written by Professor Edwin M. Borchard of Yale University Law School several years ago, entitled "Convicting the Innocent" points out 65 cases of glaring miscarriages of criminal justice. Unfortunately, the law makes no provision by which those whom it wrongs may be compensated. Not only should the State jealously guard the fundamental rights of accused persons, but it should go further and indemnify those who are the victims of legal injustices.

Although many opponents of the Public Defender plan at first resented entirely the criticisms that grave defects exist in our criminal system, they have recently shifted their position. They now admit that the accused poor person is the victim of discrimination, but they challenge the efficacy of the proposed remedy. This change of front is undoubtedly the result of the wide publicity given to the evils inherent in our criminal court procedure, the wide-spread demand for a better defense of accused poor persons and the kindling in the public mind for American fair play in the courts.

Chief Justice Taft said in a pamphlet several years ago:

"I think we shall have to come and ought to come to the creation in every Criminal Court of the office of Public Defender and that he should be paid out of the Treasury of the County or the State".

The Public Defender proposal is not a mere sentimental appeal sponsored by over-zealous reformers, but it is based on the spirit of elemental justice to those accused persons who, because of their poverty, are denied their Constitutional right to a fair trial. No one should be compelled to suffer because of his race, creed or purse. The system of "assigned counsel" should give way to the more enlightened system of public defense to those who are unable to properly defend themselves. The trial of a criminal case should be an impartial search for the truth, rather than a "sporting contest" or a "battle of wits" between opposing counsel.

The office of Public Defender where it has been well tested in this country, has resulted in avoiding unnecessary trials, in a more efficient administration of justice, and in saving expense to the community.

The objection so persistently urged against Public Defenders because of its alleged expense, has been shot to pieces by actual demonstration in various communities.

From an editorial published in the May-June, 1934, issue of "The Journal of Criminal Law and Criminology" it appears that the Chicago Public Defender:

"By expediting the trial and disposition of cases and by eliminating unnecessary trials and waiving jury trials where that can legitimately be done, tremendous saving is effected, far in excess of the expense of maintaining the office of Public Defender x x x *and the office has paid for itself five times over*".

This article also recites that:

"A community is indeed blessed which has a public-spirited prosecutor and a public-spirited defender".

According to a statement by Public Defender Bachrach of Chicago, in his annual report in July, 1934:

"During the period from October, 1930 (when the office was created) to July 1st, 1934—8077 cases were disposed of *and the community was obliged to pay $1.67 for the legal work done in each case*".

What is true of the efficiency of the Chicago Public Defender's office is also true of the Public Defenders in San Francisco, Los Angeles, Oakland, Hartford, New Haven, Bridgeport, Columbus and other places where that office is functioning, as can be readily established by authoritative [illegible] from such communities.

The Voluntary Defender now functioning in New York ty, as an auxiliary of the L Society of New York. Defenders are also functi other cities. They are do lent work and this undoub step in the evolution towa Defenders. The real object Voluntary Defender plan functions as a charity and not an adequate substitute

The Public Defender ide fied by historical precedent the procedure in foreign It has stood the test of tim perience. Strange as it m many of the older civiliz guarded more jealously the accused persons in some resp we have in this country.

At the 1932 annual meeti New York State Bar A after a 10-year fight by me on the floor of the Associati ceeded in getting a resolut placing the Association on favoring the principle of P fenders.

2. Compulsory State Defe All Accused Persons

Although I have persist for 20 years past, State marily for the *poor*, it question, in the light of ganized crime" and the public resentment again ble criminal lawyers—"*Br ish private defense in c altogether, so that publi accorded to all accused p*

Important as it is to pro gal rights of the individu of crime, the *community* tled to a "break." The pu ty well fed up with the k racketeers and gangsters, ing of the "criminal r frequently "get away with crooked lawyers and "ma nals" who frame defenses ture "alibis", bribe witnesses nesses "on the spot", supply nesses and obstruct justice in devious ways.

The menace of the "lawy nal" is so serious, that the A Bar Association and vario Bar Associations, are now tackling the problem of pu Bar of its disreputable

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ling. By the terms nce the permit was e order of the board rs upon the report of buildings that "th nances of the borough with. In Decemb d of commissioners adopted a zoning off the borough nmercial" and "non s and prohibiting b dustries within the zone. The lot in is in an area zoned cial and is more than fifty feet from a The land lying erly line of Ocean A t, the high water mar ic Ocean on the east northerly and south borough—being the t as far inland as O by the terms of the rd either as "comme n-commercial". In th no zoning restrictions perty is owned by the dley Beach. Never across the street fr s of the appellant th e been for upwards o rs past, public bath h shment stands vendin erages, cigars, ciga hes and frankfurters. 's land has been used e long before 1923 fo is courts and the sal of food and liquid ordinance contained a board of adjustm hinery for the super ement of its mandate le application under nance for a permit by the board of e borough because rect a commercial st commercial zone". he question for us ther there was an eff nance, for the restri iness uses in specific in that enactment. had no definite or s onship to the safety, h general welfare of th therefore was inval *ley*, 99 N.J.L. 389. *F Lumber Co. vs. Fitz* L. 183, and could no icipal refusal unless validated by the zo of 1927 to the con the enabling act pass hority thereof (ch. 274 ection 7 of the 1928 s that "whenever any ll have adopted an nances prior to the act, for any of the h in this act, such inances, shall continue hey had been adopte visions of this act". d that an earlier ordi ective "as if * * * *provisions of this a mber Company vs. ra. Would the borou nce have been valid i pted subsequent to th 1928 statute? If it w valid under a subs , its earlier passage particularly since six sed between the pas ng statute and the r ent issue, abundantl borough to have am nce to conform with such been the purpose ute in section 9 prov erning body shall pro ointment of a board "in the regulation an pted pursuant to the act shall provide t rd of adjustment may ial exceptions"; that stment shall consist who shall not hold e or position under ty, vacancies to be xpired term; that the board shall have po oenas for the attend and the productio y administer oat

Current Decisions

(Continued from page 1)

ling. By the terms of the or-nce the permit was to be issued e order of the board of commis-rs upon the report of the inspec- of buildings that "this and other nances of the borough" were com- with. In December, 1923, the d of commissioners of the bor- adopted a zoning ordinance set- off the borough into various mmercial" and "non-commercial" s and prohibiting business trade ndustries within the non-commer- zone. The lot in question was is in an area zoned as non-com- cial and is more than one hundred fifty feet from a commercial The land lying between the erly line of Ocean Avenue on the t, the high water mark of the At- ic Ocean on the east and between northerly and southerly lines of borough—being the entire beach it as far inland as Ocean Avenue by the terms of the ordinance, not ed either as "commercial" or as n-commercial". In that area there no zoning restrictions. All of that perty is owned by the Borough of dley Beach. Nevertheless, on it across the street from the prem- s of the appellant there are, and e been for upwards of twenty-five rs past, public bath houses and re- shment stands vending ice cream, erages, cigars, cigaretts, sand- hes and frankfurters. The appel- 's land has been used continuously e long before 1923 for commercial is courts and the sale of tobacco of food and liquid refreshments. ordinance contained no provision a board of adjustment or other hinery for the supervision or en- rement of its mandates. Appellant le application under the building nance for a permit and was de- by the board of commissioners he borough because "it was sought rect a commercial structure in a commercial zone".

he question for us to decide is ther there was an effective zoning nance, for the restriction against ness uses in specified zones lay in that enactment. The restric- had no definite or substantial re- onship to the safety, health, morals general welfare of the community therefore was invalid. *State vs. ley*, 99 N. J. L. 389, *Frank J. Dur- Lumber Co. vs. Fitzsimmons*, 106 L. 183, and could not justify the nicipal refusal unless the ordinance validated by the zoning amend- it of 1927 to the constitution and the enabling act passed under the ority thereof (ch. 274, P. L. 1928). ection 7 of the 1928 statute pro- s that "whenever any municipality ll have adopted an ordinance, or nances prior to the adoption of act, for any of the purposes set h in this act, such ordinance, or inances, shall continue in effect as hey had been adopted under the visions of this act". It is to be d that an earlier ordinance is made ective "as if * * * *adopted under provisions of this act*". *Durkin ber Company vs. Fitzsimmons, ra.* Would the borough zoning or- ance have been valid if it had been pted subsequent to the passage of 1928 statute? If it would not have valid under a subsequent adop- , its earlier passage cannot save particularly since six years have sed between the passage of the ng statute and the raising of the ent issue, abundantly ample for borough to have amended its or- nce to conform with the statute such been the purpose. The zoning ute in section 9 provides that the erning body shall provide for the ointment of a board of adjustment "in the regulation and restrictions pted pursuant to the authority of act shall provide that the said rd of adjustment may * * * make ial exceptions"; that the board of astment shall consist of five mem- who shall not hold any elective e or position under the munici- ty, vacancies to be filled for the xpired term; that the chairman of board shall have power to issue poenas for the attendance of wit- and the production of records y administer oaths; that ap- peals may be taken to the board of adjustment by any aggrieved person and that there shall be a hearing thereon, of which due notice shall be given.

We have recited the statutory powers of the board of adjustment sufficiently to reflect the very important and, as we think, the essential place which that board occupies in the legislative scheme. The general framework of section 9 of the 1928 statute was taken almost bodily from ch. 58, P. L. 1925. The board of adjustment as there constituted was said by Chief Justice Gummere in *Chancellor Development Corp. vs. Senior*, 4 Misc. 633, to be "a tribunal of review"; by Mr. Justice (now Chancellor) Campbell in *Hendey vs. Ackerman*, 103 N. J. L. 305, to be a "*quasi* judicial" body; and by various other Supreme Court decisions "to act judicially", *State vs. Dotzling*, 5 Misc. 180, *Feldman, et al. vs. Board of Adjustment*, 6 Misc. 520, *Ewald vs. Board of Adjustmen*, 6 Misc. 532, *Benbak Construction Co. vs. Board of Arjustment*, 6 Misc. 543. The statute contains provisions for creating drastic limitations upon the uses to which an owner may put his property. As a part of the scheme the legislature commanded that a governing body in passing a zoning act thereunder should provide for the appointment of this *quasi* judicial body known as a board of adjustment. That mandate has been wholly ignored in the Borough of Bradley Beach. The record shows no finding upon, and no consideration of, the question of whether or not the property should be made one of the "special exceptions" to the terms of the ordinance. Whether the exception, if granted, would or would not require the approval of the board of commissioners need not be decided. It cannot be said what the commissioners would have done in the face of factual findings and of recommendations made by a board of adjustment. The property owner was deprived of a process provided by statute. For the views of the Supreme Court and of the Court of Chancery on the importance of the board of adjustment under, however, different factual and legal issues, see *Schumacher vs. Union City*, 9 Misc. 402, and *Ostrowsky vs. Newark*, 102 N. J. Eq. 169.

The procedure for the lawful ascertainment of facts and for judicial action thereon is, in our opinion, an essential adjunct to a zoning ordinance dependent for its validity upon the 1928 statute whether the ordinance was adopted before or after the passage of the statute. Respondents cite *Smith vs. Kearney*, 6 Misc. 954, *contra*. In that case the superintendent of buildings denied an application for a building permit. Appeal was taken to the "zoning board of appeals", which reversed. *Certiorari* issued at the instance of a neighboring owner adversely affected by the proposed construction. The Supreme Court held that the zoning board of appeals was an illegally constituted body and that therefore a judgment by it was void. Apparently there was no issue and no decision upon the question whether a statutory appeal body was necessary under the 1928 enabling act. There were rather numerous decisions by the Supreme Court following closely upon the passage of the enabling act wherein the court in its discretion refused to use its prerogative writs to compel municipal zoning action, as in *Koplin vs. South Orange*, 6 Misc. 489, where the proposed construction had "been declared by legal authority to be a menace to the safety of the community", and in *Hansbury Construction Co. vs. Miller*, 6 Misc. 604, wherein it had "been declared by legal authority to be improper for the safety of the community". But no question of safety is injected in the present case, and the intervening years have, as already remarked, given the municipalities full opportunity to make their zoning acts comply with the statute. Moreover, the question with us is one of right and not of discretion.

Respondents present no objection to the procedure by writ of *mandamus*. Under the facts of the case that seems to be an appropriate remedy. *Goldberg vs. Jersey City*, 6 Misc. 564.

We conclude that the ordinance is ineffective in its prohibitory provisions against the appellant's lands. That leaves the application for permit to be controlled by the 1920 ordinance, concerning which, and the compliance with which, there is no dispute. The demurrer to the legal sufficiency of the facts should have prevailed. The judgment below, overruling the demurrer, will be reversed and the record remitted to the Supreme Court.

CORPORATIONS — Contracts — Officers' Individual Liability.

New Jersey Court of Errors and Appeals

Crossley vs. Binns, et als.

May 17, 1935

For Appellants: Frank Benjamin

For Respondents: John J. McCloskey, Saul Tischler, of Counsel

On Appeal from Essex County Circuit Court. Affirmed

The opinion of the Court was delivered by Justice Lloyd.

The appeal is from a judgment of nonsuit entered in the court below. The action was to recover damages in the form of unpaid rent of premises in the City of Newark, and was based upon a written agreement between the parties which it was claimed obligated not only the defendant, "45 Branford Place Corporation," to its performance, but likewise obligated the remaining defendants as individuals.

The plaintiffs leased the premises involved to the corporation in June 1926, reserving certain large rentals. On March 1, 1932, default in the payment of rents occurred, and the agreement sued upon was entered into. The agreement was in the form of a letter from the landlord to the tenant and acceptance by the latter. After providing for a modified method of payments, both on time and amount, the final clause of the letter read—

"8. This arrangement, which is given to you for the purpose of relieving the distress arising from the losses in rent, shall in no way be considered a modification of the lease, but the lease shall stand in all its terms and conditions and the executive officers of the company shall signify their approval of the foregoing arrangement by signing the same and agreeing to carry it out both in letter and in spirit."

The acceptance was in this form—

"45 Branford Place Corporation does hereby consent to the foregoing arrangement and we, the undersigned, the executive officers of the corporation do hereby agree to carry out the terms of the said arrangement in all particulars.

45 BRANFORD PLACE CORPORATION

By Frank Binns, President

By David Cronheim, Secretary

By A. S. Cronheim, Treasurer".

The proper construction of the agreement alone is involved, and the question for determination is whether there was intended a personal undertaking by the individuals named or whether the undertaking was wholly in their official capacity as officers of the corporation.

The learned trial judge construed the agreement as imposing no personal liability other than as officers in in which respect no default is alleged, and with that conclusion we agree.

Construing the agreement it is to be noted that the designation of the individual defendants is as executive officers of the corporation, and their signatures likewise, insofar as they constitute more than the signing of the corporation name, are as officers of the corporation. There is nothing, we think, in the writing to suggest a further purpose. It involves nothing more than an obligation on the part of the individual defendants as officers by honest endeavor to see that the undertaking of the corporation was carried out. Both clauses above quoted, we think, imply this and nothing more.

The Judgment is affirmed.

BANKS and BANKING—Insolvency —Priority Claim—Trust Funds.

In Chancery of New Jersey

Mary Buxton Banks vs. Commissioner of Banking and Insurance of the State of New Jersey, in charge of Glassboro Title & Trust Company, in liquidation

May 17, 1935

For Complainant: Hon. Elmer B. Woods

For Defendant: W. Orvyl Schalick, Esq.

Davis, V. C.

The Bill seeks to impress a trust upon the assets of the Glassboro Title Company, closed and in charge of the Commissioner of Banking and Insurance.

On September 22, 1931, complainant had on deposit with Glassboro Title and Trust Company, hereafter referred to as "trust company," in a time account, $1700. On that day she, in company with her sister, Lilly M. Buxton, called at the trust company and conferred with Charles R. Mease, assistant treasurer, and authorized him to purchase 35 shares of capital stock of United Gas Improvement Co., which stock was ordered by Mease on that day from F. P. Ristine & Co., stock brokers, in Philadelphia. A bill was rendered to complainant, dated September 22, 1931, for $1008.13, representing the purchase price of the stock, including commission, and under date of September 25, 1935, the account of complainant was charged by the trust company with this amount, although the charge slip for same was dated September 24th; on September 25th, a credit entry was made in the Treasurer's Check Account of the trust company, and a check, dated September 24, 1031, for $1471.13, made payable to F. P. Ristine & Co., assigned by C. R. Mease, assistant treasurer of trust company, was mailed to Ristine & Co. This check represented the amount due Ristine & Co. for the stock so purchased for complainant of $1018.13, as well as that purchased by her sister, Lilly M. Buxton, amounting to $453.00, the latter purchase having been brought about by a similar transaction with the trust company and at the same time, and is the subject of another action brought concurrently with this one, and which was heard at the same time. The tresaurer's check referred to was forwarded to the trust company for collection through the usual channels and was protested on September 28, 1931, because the trust company was then in the hands of the Commissioner of Banking and Insurance of the State of New Jersey. This protested check, through the usual channels, was returned to Ristine & Co. The trust company was taken over by the Commissioner of Banking and Insurance on September 28, 1931, but the last banking day was Saturday, September 26th. The Treasurer's Account had not been charged with this check when it was received by trust company on September 28th, the date when the Commissioner took possession of the property and business of the trust company, pursuant to P. L. 1931, page 641, being an Act to Amend an Act concerning Trust Companies (Revision 1899). The complainant filed a proof of debt and petition with the commissioner, seeking to have the sum of $1018.13 determined to be a preferred claim. This claim was rejected by the Commissioner on December 17, 1932, and thereafter this suit was instituted by complainant.

The decree sought by complainant against the defendant is that a trust be impressed upon the assets of the trust company to the extent of $1018.13, the amount of such claim, and that the defendant be decreed to pay the complainant that amount, with interest.

When the trust company charged the account of complainant with this sum and credited the Treasurer's Account with a similar amount, it held that sum in trust for complainant until it had been disbursed for the purchase of stock in accordance with the arrangement between the parties. The transaction as it was carried out, however, did not result in a segregation of this amount from the other bank funds, even though complainant's account was charged and credit given in the Treasurer's Account; this was nothing more than a bookkeeping transaction to show transfer from complainant's account to a special treasurer's account. The Treasurer's Account was augmented by the amount of this check after the amount thereof had been charged to the accounts of complainant and her sister, Mrs. Buxton, and the trust company undertook to transmit this fund so held by it for the purpose of paying for this stock, by the issuance of its treasurer's check. In Acuntius v. Steneck Trust Company, 111 N. J. E. 81, at page 83, Vice Chancellor Fielder said, "The fact that receipt of the payment was entered in an account having a special title, constitutes no separation of the fund from the other funds; that was merely a bookkeeping record to show a debt owing by the bank to complainants." In the case before me, the fact that the trust company issued its check, at complainant's request, to her creditor cannot result in improving her position so far as her claim to preference is concerned. If, the check had reached the trust company for collection prior to its closing and had been charged against the treasurer's account and the remittance had not been made therefor, the transaction would have come within the provisions of Chapter 270, P. L. 1929, known as the Bank Collection Act. Whether it does come within the provisions of that Act, under the circumstances by which this transaction was carried out, it is not necessary for me to here determine, because such a claim under the Bank Collection Act could only be enforced by Ristine & Co., the payee of the check, or their assignee or assignees. The evidence disclosed that the bills rendered by Ristine & Co. to the complainant and Mrs. Buxton, in payment for which the treasurer's check had been forwarded, were receipted, under date of September 25, 1931. The stock, however, was never delivered because of the non-payment of the treasurer's check and failure of complainant and her sister, Mrs. Buxton, to send new checks for the aggregate amount of the stock so purchased by them, in accordance with directions contained in a letter sent to them by Ristine & Co., dated September 28, 1931, a copy of which is annexed to the bill.

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THURSDAY, MAY 30, 1935

Cooperation

The annual meeting of the New Jersey State Bar Association will be held Friday and Saturday, May 31st and June 1st, at the Marlborough-Blenheim, Atlantic City. A varied and interesting program has been arranged. Speakers will include Scott M. Loftin, President of the American Bar Association, Federal Judge Orie L. Phillips and Dean Herbert F. Goodrich. Robert H. McCarter has also been asked to address the association. He will probably be unable to resist the comment that the young lawyers of today do not measure up to the standards of his own early years. Any communication from the loved and venerated "R. H." is more or less privileged, and the junior bar seems quite willing that he should continue to cherish this fond illusion.

Josiah Stryker will make his formal address as retiring President on Saturday morning. He has conducted the affairs of the association with exceptional ability and success. It is encouraging that President Stryker's mid-winter meeting in Newark was the best attended of any meeting held thus far. It is to be hoped that this record attendance indicates a more eager participation in the affairs of the association. In the past ten years it has changed from a pleasant, ineffectual, social organization to a vital, hard-hitting champion of lawyer's rights. It has discarded the shackling worn-out traditions of hypocritical indifference, and entered fields which have always been properly its own.

The Bar Association has furnished the impetus and strength for the work of the Judicial Council; it has exerted a salutary influence upon the selection of judges; it has raised the educational requirements of candidates for admission to practice; it has effected numerous reforms in procedural and substantive law; it contributed largely to the success of the Crime Conference. In short, the State Bar Association has dedicated itself to better administration of justice, deeply aware of the labor, the hostility, the heartache which such a dedication implies.

The splendid work of its committees and members is hampered on every side by provincial conservatism, by cheap political opposition and most of all by the impudent selfishness of the ignorant and the stupid. These obstacles are difficult to overcome. They can be met only by the sustained and concerted action of the legal profession. Among the oldest in the country, founded nearly 40 years ago, our Bar Association is particularly fitted to lead and coordinate the legal activities of the State. But it can accomplish little without the untiring support of the bar, and much the greater part of this support must come from the younger lawyers. With a few notable exceptions, the older members of the bar have become perhaps a little tolerant of the evils around them, a little too easily persuaded that nothing can be done. A great deal can be done. Much has already been started by the Bar Association. It deserves the help and cooperation of every lawyer in New Jersey. The misgivings expressed by President William T. Boyle at the annual meeting two years ago, may well be repeated today:

"The time is at hand for courageous and determined action on our part, otherwise the profession of the law will yield its position of eminence, honor and influence in the forum and on the bench to the place-hunter and spoilsmonger, and then, if that day shall ever arrive, there will be missing from the temples of justice the learned and honorable ministers to whom we have been so long accustomed and the glory of the bar will pass forever".

Recent Case Comment

(Continued from page 1)

testator's death until the period of distribution—a circumstance which would have vested the gift of principal and (3) because the will provided that in the event one of the children died before the estate was distributed, leaving children, his share was to go to his children. The court held this so, despite the rule of law favoring the vesting of remainders.

The court blandly without discussion cites to support it, the case of Post v. Herbert's Executors supra. In this case a testator gave to his trustee a tract of land in trust to pay the rents to his son-in-law Abraham, until the youngest child of Amy, the testator's deceased daughter, should attain the age of twenty-one; and "after" the said youngest child attains the age of twenty-one years, the executors are directed to sell the land and to divide the proceeds among the children of Amy equally. The Court of Errors held the gift to the children of Amy vested. It reasoned that a bequest to a class "after" a member attained a given age, is prima facie contingent, but where the future gift is postponed so as to let in some other estate or interest e. g. the estate in Abraham, the future gift is vested. The court held that the fact that the class was to take when one of the children attained a certain age, did not make the legacy contingent but merely operated as a notation of the time when the money was payable. There are hosts of cases in accord with the Post case. The principle of the case is equally applicable whether the vested estate is introduced by the word "when" (Boraston's Case 3 Rep. 19 appproved in Post v. Herbert's Executors) or "when and as soon as" (*King v. Isaacson* 1 Sm. & Gif. 371, 65 Rep. 163, where the language of the gift commenced "as and when").

Until the eldest becomes thirty, the situation is this, in the Clark case. There is a precatory trust for the maintenance and education of each of the children until he becomes twenty-one years (*Cox v. Wills* 49 N. J. Eq. 130, 22 At. 794 affirmed on this point at 49 N. J. Eq. 573, 25 At. 938, *Rider v. Myers* 113 N. J. Eq. 360, 167 At. 22 affirmed 115 N. J. Eq. 169, 169 At. 691); and thereafter he gets a share of the income until he becomes 30. The wife is to receive the balance of the income remaining after providing for their maintenance until the children respectively become twenty-one; and thereafter she gets a share of the income untli the eldest becomes thirty. If the wife had received all of the income until the eldest becomes thirty, that would have been the case of *Post v. Herbert's Executors*; and the gift to the children would have vested. If the children were to receive all of the income until the eldest became thirty, the law is settled (as admitted in the Clark case, *Dusenberry v. Johnson* 59 N. J. Eq. 336, 45 At. 103, *Hicks v. Hicks* 99 N. J. Eq. 92, 132 At. 857 affirmed 100 N. J. Eq. 346, 134 At. 917) that such a gift of income would vest the remainder interest.

First. The wife and children together were to receive all the income. Then why should not the remainder be held vested? Is it not a case of the combination of the fundamental principles of the Post and the Dusenberry cases—a combination of an estate to the wife in part of the income and the remainder of the income to the children?

Second. Can we from other angles arrive at the conclusion that the remainder is vested? The wife was to receive only a pro rata share of the income from the time the children reached twenty-one until the eldest reaches thirty. We cannot therefore say under *Post v. Herbert's Executors* that her pro rata share of the income during that period vests the pro rata remainder interest of the children. But why under the Dusenberry case does it not vest her own interest? And if the remainder gift to the wife is vested, why should the remainder gifts to the children coming at the same time and in the same language be held contingent?

Third. We cannot say that the pro rata share of the income that is to go to the children between twenty-one and thirty vests their share in the principal, unless we determine that the gift of the income is vested. The testator would hardly have intended such term for years in the income to be contingent and the remainder interest to be vested. As the cases put it, where the principal and the intermediate gift of income

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VOLTAIRE A. GICCA
Mexican & Brazilian Lawyer
342 Madison Avenue
New York City
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...ent Case Comment

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...o indistinguishably blended that must vest or both be contingent, no argument for the vesting of principal can be drawn from... of income. That was the prin... of the famous case of *Knight ...night* 2 S. & St. 490 though the ... were different than ours. ...ere, a gift was made to each of ...daughters of A as soon as she ...ined twenty-one years, in the ... of £200 pounds with interest at ...). It does not help us to know ... there is respectable authority ... where there is an intermediate ... of income to a class, the subse... ...nt gift of principal to the class ... a specified age is vested even ...gh the intermediate gift does ... extend the whole time from the ...th of the testator to the period ... distribution of the principal: *...ies v. Fisher* 5 Bea. 201, Contra *...rson v. Dolman* L. R. 3 Eq. at 321. ... the case of *Davies v. Fisher*, the ...rmediate gift of income com...nced at the death of the testator ... was therefore vested. (*Fidelity ...on Trust Co. v. Rowland* 99 N. ...Eq. 72, 132 At. 673).

...e must therefore go back a step ... see whether the intermediate ... of income to the children be... ...en twenty-one and thirty was ...ted. It may be the law in New ...sey that the intervening pre... ...ory trust for maintenance of the ...ldren does not vest the gift of ...ome to them between twenty-one ... thirty. The weight of the Eng... ...l authorities is to the effect that ... gift of a remainder interest to ...ldren when they arrive at a cer... ...n age following a gift of so much ... the income as trustees shall con... ...er proper for the support of chil...n, vests the remainder interest: ...r v. *Fox* L. R. 19 Eq. 286, Re ...arker 36 Ch. D 44, Re Williams ...907) 1 Ch. 180. But there is an... ...er English case that holds that ... aliquot part of the fund must be ...ered therefrom, out of which the ...ild is to receive maintenance; and ... gift is not vested where the ...intenance comes out of some ...mmon fund for the support of ...veral legatees: In re Wintle (1896) ... Ch. 711. Our own Court of Chan... ...ry has drawn the same distinction ... the Wintle case: Gifford v. Thorn ... N. J. Eq. 702 at 708, affirmed at ...e *Trepp v. National Bank* 98 N. J. ...q. 462; *Contra Ballantine v. Wood* ... N. J. Eq. 552, 9 At. 582, *Haggerty Hockenberry* 52 N. J. Eq. 354, 30 ...t. 88.

But in any case this writer be...eves that the gift of the income to ...e children from twenty-one to ...irty is vested, and for this reason. ...he gift of income to the wife dur...g the minority of the children ...ests on the testator's death (*Fidelity ...nion Trust Co. v. Rowland* supra) ...nd comprises all the income not ...roper for maintenance. It is be...ieved that the gift of income to the ...ife during their minority (of all ...hat is not proper for this main...enance) is a sufficient intervening ...terest to call into play the rule of ...ost v. Herbert's Executors* and vest ...e succeeding gift of income to the ...hildren from twenty-one to thirty. ...here is little law on the vesting of ...ntermediate gifts of income; but the ...eight of such law as there is, puts ...e vesting of such gifts in the same ...ategory as the vesting of principal. ...See *Davis v. McKown* (Maine) 160 ...t. 458, *Clarkson v. Pell* (R. I.) 24 ...t. 110, *Matter of Deaken* 257 N. Y. ... 839, contra *Matter of Hopper* 266 ... Y. S. 430 affirmed 273 N. Y. S. ...70. Pennsylvania has held that in ...e case of a gift to a class, the right ... income ceases at the death of a ...ember and a gift over is impliedly ...ade to the survivors: contrast *...axwell's Estate* (Penn.) 104 At. 501 ...ith *McGlinn's Estate* 77 Pa. Super. ...82. But this is doubtful even in ...ennsylvania, see *Lafferty's Estate* ...Penn.) 167 At. 44). If therefore ...he intervening gift of income to the ...hildren between twenty-one and ... is vested, then the remainder ... of principal being "blended" and being *consimili casu*, would likewise vest.

Fourth. If the rule of the Chancellor in *Gifford v. Thorn* supra, were to be discarded the logical step to our conclusion would be simpler; since then there would be (1) a gift of maintenance to the children during their minority, (2) a gift to them of income from twenty-one to thirty and (3) a gift of income to a third party during their minority and until they were thirty, making a neat combination of three factors any one of which if taken alone would vest the remainder interests; and therefore all taken together in one scheme would vest the remainder interests.

Fifth. The court in the Clark case adds one more argument. It says that the gift over to the testator's grandchildren if a child of his died prior to becoming 30 leaving children, indicates that the remainder to the testator's children was not vested; since if the remainder was vested, the "gift over" would be surplusage, as the grandchildren would take their parent's share under the inheritance laws. This argument of the court falls flat, for if the remainder had vested, it would not necessarily pass to the donee's children but might pass under his will to a charity or by the intestate and dower laws in part to the donee's wife. It is far from surplusage. It keeps the property among the testator's issue.

The argument really turns against the court. It harks back to Jarman. Suppose a gift is made to a class when one becomes thirty and if one should die under thirty leaving children, then his share is to go to his children. Jarman argued that this created the implication that if one died under age without children his estate was to retain the legacy—in other words an implication of a vested gift, subject to be divested by death prior to thirty with children. This argument of Jarman is supported by much authority, 2 Jarman 6th Ed. 1426 et seq., 69 C. J. 609; and there is some conflicting law based on dubious reasoning (same authorities, see *Hewitt v. Green* 77 N. J. Eq. 345, 77 At. 25). If Jarman's argument is sound, it supports our conclusion. At any rate New Jersey would probably not hold (as some jurisdictions do) that a remainder interest such as ours becomes contingent by reason of the "gift over", *Dusenberry v. Johnson* supra.

Finally, one may be permitted to inquire, what was the dispute? If the remainder to Herberton was contingent and was an interest in personalty, it passed to his mother and sister under the testator's will, as the court held; and if it was vested, it passed under the intestacy laws to the same persons. If the remainder interest was realty, has the Orphans' Court power to determine title to same on a petition for construction of a will, addressed to it for that sole purpose? The question was perhaps one of commissions to the administrator of Herberton in the personalty of testator's estate

Bar Association Notes

State Bar Association

The annual meeting of the State Bar Association will be held at the Marlborough-Blenheim Hotel in Atlantic City on Friday, May 31, and Saturday June 1, 1935.

An interesting program has been arranged. Speakers will include Scott M. Loftin, President of the American Bar Association, Federal Judge Orie L. Phillips, Dean Herbert F. Goodrich and Robert H. McCarter.

Digest of Recent Decisions

(Continued from page 1)

the examination of the title;" and that the allegations of the bill were sufficient to put the defendant to his proofs.

TROVER — Conversion — Proof of Possession—Suit by Administrator.

New Jersey Court of Errors and Appeals
Baude vs. Chemical Bank & Trust Co., Administrator C. T. A. etc.
Parker, J.
May 17, 1935
For Appellant: William Elmer Brown, Jr.
For Respondent: Harry R. Coulomb
Appeal from Supreme Court. Reversed and remanded for new trial.

1. In an action of trover, the gist of the action is conversion; and conversion postulates possession at some time by the defendant. Such possession must be proved unless admitted.

2. The facts that a testatrix in her lifetime had possession of certain bonds belonging to the plaintiff, that she died and that defendant was appointed and qualified as administrator with will annexed, are not evidential that defendant came into possession of the bonds in question.

3. In a suit against an administrator c. t. a. for alleged conversion by it of bonds deposited by the plaintiff with testatrix in her lifetime, it was error to charge that the administrator would be liable on proof of the deposit and after demand for return of the bonds and failure to return though such administrator never had physical possession of the bonds.

THEATRES — Negligence—Darkness—Assumption of Risk.

New Jersey Court of Errors and Appeals
Falk vs. Stanley Fabian Corporation
Case, J.
May 17, 1935
For Plaintiff-Respondents: John W. McGeehan, Jr.
For Defendant-Appellant: Joseph Coult, John J. Francis
On Appeal from Supreme Court. Reversed—Venire de Novo.

The plaintiff sued in the Essex Common Pleas alleging that she was injured while attending a moving picture theatre owned by the defendant, as a result of inadequate lighting and a loosened carpet.

The plaintiff occupied a seat upon what is called a balcony but was really an ascending incline at the rear of the orchestra floor, served by steps that rose from the main floor level and opened into several rows of seats. The stairs were carpeted.

When she rose to leave she walked past the intervening seats to the neighboring steps and tripped at or near the edge of the carpet. There was no direct lighting upon the steps at that point. A small recessed light on a lower step did not reflect upwards.

There was a motion for a non-suit and for a directed verdict by the defendant which the trial court refused to grant. After judgment there was an appeal to the Supreme Court where judgment was affirmed.

Held that: 1. A moving picture theatre operator violated no duty to a patron if, while a picture is being shown, the condition of light is that ordinarily used in exhibiting moving pictures to enable the audience to get a reasonably clear view of the image thrown on the screen; 2. A theatre patron who sues alleging that the condition of light at a moving picture show was not equal to that ordinarily used in exhibiting moving pictures must submit proof of such ordinary usage, thus manifesting the deficiency; 3. A moving picture patron who loiters while the theatre is in a darkened condition and after remaining two and one-half hours undertakes to leave, unattended by an usher, while the house is in the same darkened condition, knows the extent of the darkness and assumes the risk due solely to that condition; 4. An otherwise faulty ruling will not be saved by assuming the existence of a controversy which apparently was not an issue at the trial.

AUTOMOBILES—Master and Servant—Violation of Orders—No Riders.

New Jersey Court of Errors and Appeals
Axford vs. Purity Bakeries Corp.
May 17, 1935
For Defendant - Appellant: Jacob Schneider
For Plaintiff-Appellee, Edward R. McGlynn
On Appeal from Circuit.
Bodine, J.

The defendant appeals from two judgments in actions tried before a court and jury. The trial court followed the opinion of this court in Axford vs. Purity Bakeries Corp., 112 N. J. L. 594, submitting to the jury the question whether, at the time of the accident, the servant had so far deviated from his employment that the relation of master and servant had ceased to exist. The cases before us were a new trial of the cases above referred to made necessary because in those cases the court had directed a verdict for the defendant. It is conceded that the facts at the new trial were identical, but for one circumstance, with those established at the earlier trial. The only added proof was that the truck in question bore the sign "No Riders." This inscription had been placed upon the truck about six months before the accident.

"Where a servant is acting within the scope of his employment, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was contrary to his master's orders." Klitch vs. Betts, 89 N. J. L. 348. Also 39 C. J. 1285, and cases there collected.

Manifestly the trial court in following the law of the case laid down by this court committed no error. The circumstance that the driver was forbidden to take riders would not, as a matter of law, make him less on his master's business. The question of deviation on the facts presented was for the jury and the court so charged.

The judgments are affirmed.

DISTRICT COURT APPEAL—Settlement State of Case.

New Jersey Supreme Court
Thatcher's Inc. vs. Schneider
Before Justices Lloyd, Case, Donges, Per Curiam
May 2, 1935
For Appellant: William J. O'Hagan
For Respondent: Charles S. Smith
Motion to Dismiss Appeal—Denied.

A motion is made to dismiss an appeal from the District Court for failure to settle the state of case in accordance with Section 213b of District Court Act, which provides substantially that a state of case for appeal shall be agreed upon or settled within twenty-five days after judgment unless the judge shall grant further time for that purpose.

Judgment was entered on September 26, 1934, and notice of appeal was duly served and filed as well as bond. Appellant presented a state of case to respondent who returned it and requested that it be settled by the court. Within the period of twenty-five days appellant secured an order extending the time for settlement of the case to November 10, 1934; on October 23rd, appellant requested the judge to settle the case, which was not done until January 18, 1935.

Held: That appellant did all he was required to do; that he was not called upon to force the judge to act before the time expired. The Court's action indicated an extension of time. The Court followed the rule announced in *Syring v. Zelenski*, 77 L. 406.

DIVORCE—Foreign Decree—Mexican Court—Validity.

New Jersey Court of Chancery
Newton vs. Newton
A. M. Kraft
May 22, 1935
For Petitioner: Le Roy W. Loder
For Defendant: Francis A. Stanger, Jr. and Frederick B. Edwards
On Petition for Divorce. Granted.

The petitioner alleges on her petition that the defendant procured a divorce from her in the Civil Branch First Instance Judicial District of Nogales, Sonora, Mexico, which is a nullity, and which she prays may be annulled and for nothing holden.

The parties were married on April

(Continued on page 7, col. 1)

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Public Defenders in Criminal Cases

(Continued from page 2)

Some of these lawyers are worse than the clients whom they defend. Compulsory State defense will practically eliminate the "shyster" lawyer and the "lawyer-criminal". They could no longer pervert or defeat justice for their guilty clients. It will rob organized crime of its most powerful alliance and do more than any other single thing to handicap racketeers. If vicious or rich criminals were defended by State counsel, they would get a fair trial—*and only that.* All the perjured defenses and delays that mark the modern criminal system, would disappear speedily. There would be no further reason for the shady criminal lawyer to exist.

There is no Constitutional right, either express or implied, as many mistakenly suppose, giving anyone the right to choose his own lawyer. Although the Constitution provides that an accused has a right to counsel, I challenge anyone to show that he has a fundamental right to pick his own lawyer. The pauper defendant now takes the lawyer who is assigned to him by the court, whom he never saw before, who is thrust upon him whether he likes him or trusts him, or is willing to confide his life or liberty to him, *or he does without counsel.* Any discrimination under the law between rich and poor, is opposed to every concept of justice. Although wealth enjoys always, advantages over poverty, nevertheless, before the law, every person is presumed to be, and should be, equal.

President Roosevelt has said:

"That there are two kinds of justice in this country, one for the rich and one for the poor".

Chief Justice Hughes said many years ago, that:

"The administration of the criminal law is a disgrace to civilization".

Although the *immediate* problem is to guard against injustice to those who are unable to properly protect themselves, the *ultimate* solution of the inequalities and perversions of justice in the criminal courts, must come through *State defense for all,* as long as prosecution remains a State function.

The February 1935 "Journal" of the American Judicature Society, contains an article entitled "Special License for Criminal Defenders," suggesting that specially selected lawyers of "high qualifications as to character and probity," be licensed as attorneys to practice criminal law and should be held to the strictest responsibility as officers *"of the State".* This is a mere "makeshift" proposal, although it has some merit in that it slants in the right direction. Its effect would be, to merely restrict the criminal law practice, to a smaller group of selected lawyers. It does not contemplate, that such a class should act as State officials, having the same power, resources and prestige to establish innocence as the prosecutor has to prove guilt. If it were possible to have a special list of competent lawyers, employed by and *representing the State,* from among whom, a defendant could choose his lawyer, rather than to be compelled to take a Public Defender or one of his staff, I would commend such a plan. *All* lawyers in this country, civil or criminal, must be first approved by the State as to integrity and character, before they can be admitted to practice.

Compulsory State defense for all accused persons may well be the true solution, not only of the menace of the "lawyer-criminal" and crooked lawyer, but of the entire problem of the mal-administration of the criminal law.

If the State were defending all accused persons, it would do so with an eye single to one purpose, *to establish the truth in the case and to seek justice*—no matter where the chips may fall. All of the cheap sensationalism, the lurid headlines, the spectacular methods of defense, the farcical attempts to impress the jury and to fool the public, which have been characteristic of outstanding criminal trials, and particularly the recent Hauptmann murder trial, would speedily vanish with the elimination of private lawyers. In their place would come dignified, truthful and open defenses from lawyers having no interests to serve but the cause of fundamental justice. Even if an accused be innocent, it is undoubtedly true, that many of the stratagems and much of the "ballyhoo" and inflammatory statements to the press by counsel create in the public mind, an atmosphere of guilt.

Undoubtedly, the community would be much better represented and protected by an honest, impartial Public Defender for a person charged with crime, having no interest or motive in acquitting a guilty defendant, than by the "shyster" or sensational criminal lawyer, who for pay, will stoop to any trick to defeat justice. It is no wonder, that criminal lawyers are in such disrepute with the general public, or that as a result, there is a constantly growing popular contempt for all law and all lawyers.

Criminal trials are not conducted so as to get the truth, but often to discolor, if not to entirely conceal, it. If the State puts on many handwriting experts to prove that the defendant wrote the disputed letters, the defense puts on another group to prove that he did not. Expert is matched against expert, each side putting forth only the expert witness which it knows in advance, will, for a fee, testify to facts in its favor. *If all the experts were disinterested* and in the service of the State only, available equally to both sides, with "no axe to grind", and not dependent on a fee merely from one side, they would seek and state only the truth. There could not then be the complaint, that a defendant's lack of money was prejudicial to him, and the public would, of course, have more faith in expert testimony.

In the recent *Hauptmann* murder case, there was much said about "surprise witnesses" and "alibi" defenses. "Surprise" and "alibi" witnesses for the defense followed each other on the witness stand. Why should there be any mysterious or secret or closely guarded "surprise" witnesses, or "alibi" defenses? Why should not all the witnesses and all the defenses be *out in the open,* so that they could be properly investigated and checked-up? What is all this strategy and manipulation designed for, unless it is to obtain some partisan or some unfair advantage or to impress the jury and the public with some particularly clever performance by counsel?

It seems to me that what is really necessary, is a sincere effort to reach the truth and only that. Unreliable or untruthful witnesses should not be permitted to waste the time of court and jury. A criminal case should become a scientific search for the facts, not a mere game between opposing counsel, to out-jockey one another. Both public agencies of government, prosecution and defense, endeavoring to obtain a "square deal" between the community and the accused, would present the true ideal of impartial justice, which, after all, is the final goal.

The compulsory Public Defender plan is extremely fair, since it places every defendant, rich or poor, on the same basis. The guilty gangster, racketeer, kidnapper, or rich defendant, will have no advantage, so far as a lawyer is concerned, over the poor and perhaps innocent defendant. *It is fair to the community* because it will prevent the guilty, who should be punished, from defeating justice tarough the knavery of their own crooked lawyers. *It is fair to the innocent defendant,* because it will afford him competent and honest counsel, with the resources of the State behind him to establish innocence, when there is innocence. *It will promote the administration of justice,* by inspiring respect for the law and in its honest enforcement by sworn public officials, who have no interest or purpose in perverting justice, for personal gain or prestige.

The State *now* is all powerful. It makes the laws and enforces them. It controls all the machinery of the Courts—prosecutors, Judges, jurors, police. It provides everything, except official defense counsel. The State should take over the defense of all persons charged with crime, since justice is the concern of *all* its citizens, more so, perhaps, than any other single function of government.

The opposition of the Bar to the Public Defender plan, either for the poor or for all defendants, need not be disturbing. The Bar as a whole has ever been unprogressive and ultra-conservative. No great forward-looking mass movement in the world, was ever started by the legal profession, although individual lawyers have been the champions of great reforms. It is the masses of the common people, who have always been the pioneers of every economical, social and political procession since the dawn of civilization. When public defense for *all* accused persons is finally effected, as it must be in time, just as State defense for the *poor* has been thus far established in this country, it will be so, not by any help from the Bar, but in spite of the Bar's opposition.

Perhaps, this new slant on the vital need for equal justice for *all* accused persons, as well as for the *community* as a whole, will serve to stimulate the serious thought and consideration of the Bar and the public, to the end, that popular respect for the administration of justice in our criminal courts, may be restored.

If the Bar fails to perform its duty in purging the profession of its disreputable members, the force of an aroused public opinion, will provide a drastic remedy for such omission.

The Public Defender is a step in the direction toward the Democracy of Justice and as such, it must appeal to all fair-minded people. It means a *real equality before the law* and will result in changing the present attitude of the public mind, that there is "one law for the rich and one for the poor".

*Author of "The Public Defender"; Chairman, New York State Bar Association Committee on Public Defenders.

United States Supreme Court

(Continued from page 1)

eral Reserve or the First National Bank.

The suit was instituted in the lower court by the Central Bank against the Ashland Bank for the amount of the five checks and judgment went by the plaintiff which was affirmed by the Circuit Court of Appeals.

Held, that under the rules of the clearing house, payment was final and irrevocable where after conditional settlement was made the drawee accepted delivery of the checks and gave no notice of dishonor prior to the time fixed by the rules of the Clearing House; that notice of dishonor must be given. Payment being final and irrevocable the endorser was discharged and that Sec. 102 of the Negotiable Instruments Law refers to notice of dishonor, not to the time within which a dishonored check may be returned, and does not apply in the circumstances in the instant case.

Hollenbeck vs. Leinert, 79 L. Ed. adv. op. 778; 55 Sup. Ct. 687.

INTOXICATING LIQUOR—Seizure of Vessel Used in Violating National Prohibition Act—Effect of Repeal on Liability on Bond for Breach of Condition Prior to Repeal.

On July 31, 1930, an American vessel had a cargo of intoxicating liquors. The collector of the Port of New York seized the vessel and arrested the crew for an offense against the National Prohibition Act. Thereupon the respondent Mack, claiming to be the owner, gave a bond as principal, with the other respondent as surety, in the sum of $2200, conditioned that the bond should be void if the vessel was returned to the custody of the Collector on the day of the criminal trial to abide the judgment of the court. The members of the crew were brought to trial on January 26, 1931, and upon a plea of guilty were sentenced. The vessel however was not returned by the owner to the custody of the Collector. On July 19, 1933, the United States brought suit on the bond. A motion to dismiss the complaint was made in April, 1934, the defendants contending that through the repeal of the Eighteenth Amendment on December 5, 1933, liability on the bond ended. The motion was granted by the District Court, and the Court of Appeals for the Second Circuit affirmed. (73 F. (2d) 265). A writ of certiorari brings the case here.

Held, that "penalties and forfeitures proposed by the National Prohibition but for offenses committed within the territorial limits of a state fell with the adoption of the Twenty-first Amendment. *United States v. Chambers,* 291 U. S. 217. Our holding to that effect was confined to criminal liabilities * * * On the other hand, contractual liabilities connected with the act continued to be enforceable with undiminished obligation * * *"

The judgment was reversed.

United States of America v. Mack et al. Decided May 20, 1935.

CRIMINAL LAW—Sentence—Probation—Revocation and Right of Probationer to Hearing.

Petitioner was convicted of a crime in the United States District Court for the Eastern District of Texas. He was sentenced to imprisonment but his sentence was suspended and he was placed on probation for a period of years. One of the conditions of the probation was that the probationer should refrain from violating any State or Federal penal laws. Another was that he would live "a clean, honest and temperate life."

The statute (18 U. S. C. 725) permitting suspension of sentence provided as follows:

"At any time within the probation period the probation officer may arrest the probationer upon such probationer shall be taken before the C... Thereupon the Court may revoke the probation or the sentence which might have been imposed."

During the period of [illegible] formation was conveyed [illegible] trict Probation Officer [illegible] bationer had broken [illegible] imposed. In a letter [illegible] father he was charged [illegible] eness and forgery of [illegible] The officers made a [illegible] Court and requested [illegible] of the order suspending [illegible] a warrant for his arrest [illegible] signed the warrant and [illegible] tioner was apprehended [illegible] brought before any [illegible] He was transported [illegible] penitentiary at Leavenw[illegible] and imprisoned. He [illegible] a petition for a writ of [illegible] pus in the United St[illegible] Court vs. Kansas, [illegible] he was unlawfully deta[illegible] reason that his proba[illegible] ended without an oppo[illegible] hearing made necess[illegible] statute. The District C[illegible] the writ and the Circ[illegible] Appeals for the Tenth [illegible] firmed this order.

The Court held, that [illegible] of the Probation Act [illegible] 1925, (18 U. S. C. 725) [illegible] tory and that the pro[illegible] not be revoked by the [illegible] without bringing the [illegible] fore the Court and [illegible] opportunity to be hea[illegible] although it does not [illegible] in any street or formal [illegible] mean that there shall [illegible] quiry so fitted in its [illegible] needs of the occasion a[illegible] the conclusion that dis[illegible] not been abused by the [illegible] the inquisitor to carry [illegible] deeper." The petitioner [illegible] a writ of habeas corp[illegible] his release.

Escoe v. Zerbst, Warden [illegible] cided May 20, 1935.

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...alue of Membership in the New Jersey State Bar Association

Emma Dillon, Secretary New Jersey State Bar Association

...a trite saying that the benefits ...ives from an organization are ...d by the personal interest and ...n one gives to them. This is ... membership in a professional ...ation as well as in any other. ... New Jersey State Bar Associ... as established in 1899 having ... purposes the following: to ...e the honor and dignity of the ...on of the law, to cultivate so... ...ations among its members, to ... and urge reforms in the law, ... aid in the administration of ...

... indeed fitting that the honor ...nity of the profession should ... first concern. Membership in ...ociation is a very definite con... ...n to these. The individual's ...ship lends strength to the As... ...n and, in turn, the Association ...e individual the feeling of se... ...n an honored profession.

... membership in and attend... the meetings of the Associa... ...velop a professional attitude of ... in the new lawyer. This soon ...tes itself into a professional ...or. As an illustration of this, ...eds but to observe the manner ...itude of those taking an exam... ... for admission to the Bar, and ... observe the manner and at... ...f those same people five years ... It will be noted that those who ...nterested themselves in their ... and State Associations have ...d a professional attitude much ...nickly than those who have not ...d themselves with them. It is ...is demeanor that the lay public ...dge the profession and its indi... members, and the lawyer who ... it most quickly will first re... ...e confidence of the public.

... to the maintenance of the ... and honor of the profession ... for the individual through the ...tion, the most valuable result ... development of friendships ... working together for the ...f the public and the profession. ...n put a price on friendship or ... adequately extol its value?

Of necessity, members of the Bar are usually found holding strongly biased opinions. The practice of the law easily influences lawyers to permit this tendency to go to the extreme. The growth of esprit de corps in the Association through working with each other is bound to benefit the individual member. Co-operation for the benefit of the whole, makes the Association much more valuable to the Bar in general than the individual efforts of each member thereof could ever possibly be.

Service to one's State, as encouraged through membership in the New Jersey State Bar Association, is made the basis and background of all public activities on the part of the lawyer. This is essentially one of the first principles upon which the honorable existence of the profession itself depends. Many have been chosen for high honor and service to the State because of their demonstrated ability and loyalty as members of the Association.

These benefits from membership in the Association: the maintenance of the honor and dignity of our profession, friendships, co-operation, and service to the state, are priceless and cannot be measured in terms of money.

The benefits of membership which can be measured in terms of money: a Quarterly recounting the interesting news of the profession and its members, a delightful mid-winter luncheon and a fine banquet at the annual meeting, both with attendant social niceties, are much more in New Jersey, incidentally, than in any other State.

Lawyers who give of themselves to the accomplishment of the purposes of the Association, paying dues as a necessity for the proper functioning of the organization, will receive in return, in addition to the actual tangible results of concerted effort, the more important intangible and priceless gifts of fellowship in our profession.

...est of Recent Decisions

(Continued from page 5)

...8 and went to live at Bridge... ... J. where they remained until ... 23, 1929, when the defendant ...eir home. The defendant has ...n the continuous employ of a ...ton firm for the past eighteen ...at present receiving a salary of ... per year beside a bonus.

...e time in January 1929 the de... ...t left on a business trip and re... ...l away eleven days. On Feb... ...17, 1929 a paper was served ...titioner by the Sheriff of ...rland County, printed in a ... language unknown to the pe... ...r; about a half hour later the ...ant called her on the phone and ... her whether she had been ... with a paper and when he was ...ed that she had told her he ...l a divorce and that he had ... it in Mexico. Petitioner had ...been in Mexico and entered no ...ance in the Mexican divorce ...ther personally or by attorney. ... testimony showed that neither ...titioner nor the defendant were ...ts of or domiciled in Mexico; ...pon the defendant's return to ...ton (after his absence of ...days) he went through a pre... ...marriage with one Maud D. ... with whom he has lived since. ...ertified copy of the Mexican ... of divorce (written in the ...h language) and a translation ...f in the English language of... ...n evidence recites:

* * Upon the papers and pro...ings of the action for divorce ...ohn J. Newton against his wife, ... Otto Newton, both American ...ens and domiciled in the city ...lgeton, State of New Jersey, United States of America." * * *

And a certificate of the Consul of the United States of America at Nogales, Sonora, Mexico, was attached certifying that the person who certified the same was at the time of the signing thereof, the Secretary of the Civil Branch of the Court of First Instance of the Judicial District of Nogales, Sonora, Mexico and the certificate recited the summary of a decision of the Supreme Court of Mexico as follows:

"The authority competent to try a divorce case is the Judge having jurisdiction where the husband and wife are domiciled; and according to Art. 27 of the Civil Code of the Federal District, in order to acquire domicile it is not sufficient to live at a certain place but necessary that the residence be habitual. * * * No. 2336, 1923, 2nd Section.

Held: That the defendant's purpose in going to Mexico, where he remained less than a week, was for the sole purpose and express purpose of obtaining a divorce, and that he never intended to become a citizen of Mexico or domicile at any state therein and under the authority of *Reik v. Reik*, 158 A. 519 (affd. 163 A. 907) the Mexican divorce was a nullity and declared invalid. Decree for divorce advised.

State Board of Tax Appeals

State of New Jersey
State Board of Tax Appeals

Edward T. Kennard, formerly trading as Kennard Warehouse Company vs. City of Jersey City

Application of Edward T. Kennard, formerly trading as Kennard Warehouse Company, for the cancellation of the assessment on personal property, for the year 1934, located in Jersey City, on the ground that he was not the owner thereof on the assessing date.

For Appellant: Walton B. Selover, Esq.

For Respondent: James A. Hamill, Esq., by Frank McCarthy, Esq.

Filed May 14, 1935.

Before President Weaver.

Subsequent to October 1, 1934, the assessor of the City of Jersey City assessed to Edward T. Kennard, as owner, certain personal property located at 224 and 226 Culver Avenue, Jersey City, which assessment was affirmed by the Hudson County Board of Taxation.

The appellant asks for cancellation of the assessment, on the ground that he was not the owner thereof on the assessing date. Appellant was the sole witness produced, and on direct examination testified that on October 1, 1933, he was trading under the style and name of Kennard Machinery Warehouse, and that he did not, in his own name or in the name of Kennard Machinery Warehouse, own any personal property at either 222, 224 or 226 Culver Avenue, Jersey City. On cross-examination, he testified that on the assessing date a quantity of second-hand machine tools and probably 40 to 60 second-hand machines were located in the premises, which had an area of about 8,800 square feet, and were entirely used and occupied by the Kennard Machinery Warehouse, for the purposes of his business. Later in the cross-examination he testified that the Culver Corporation, of which he was an officer, owned all of the property and that he did not occupy premises 224 and 226 Culver Avenue, except that he had an office therein. He further testified that the premises were rented to the Trust Company of New Jersey to store machinery. Following the above testimony, in the same cross-examination, he admitted that he did have the machines, lathes and tools referred to, as of October 1, 1933, in the next building.

On re-direct examination the witness contradicted his previous testimony and sought to explain that if he previously testified that he was the owner of the property, he did it inadvertently, that he never owned any of the property and wished to change his testimony.

This witness created a very unfavorable impression before the Board. He was evasive, hesitant and contradictory. His explanations as to discrepancies in his testimony are unsatisfactory. Sentences addressed to him, both on direct and cross-examination, were in the main, short, simple sentences, consisting of not more than six or eight plain words. We fail to see any reason why he could not have understood them. His conduct on the stand was such as to indicate that he was concealing the ownership of the property.

Appellant's case was conducted on a theory that upon his denial of ownership the burden of the proof shifted to the taxing district. The presumption of the law is that the person in possession of personal property is the owner thereof for the purposes of taxation. See *Cooley on Taxation, 4th Edition, Volume 2, page 1261.*

The courts of this State have repeatedly held that the assessment as made by the assessors and affirmed by the County Board is presumed to be correct, and that the burden of overcoming this presumption rests upon the person seeking to overthrow the assessment. Appellant has failed to carry the burden.

The assessment will be affirmed.

Current Decisions

(Continued from page 3)

In this suit we cannot determine what, if any, claim the complainant might have against Ristine & Co. under the circumstances, but only the effect of the transactions between the parties before the court in this cause by which complainant seeks a decree that in effect would make her a preferred creditor of the trust company.

While the trust company has not actually been declared insolvent, it has been in charge of the Commissioner since September 28, 1931, during which time a dividend of only five per cent has been paid to the general creditors; and it is quite apparent from the records that the trust company is insolvent.

The bill will be dismissed.

OBITUARY

Alfred F. Stevens, 75, of Newark, N. J., died Saturday, May 18, 1935.

Mr. Stevens was born in Hoboken, N. J., and was a descendant of the well-known Stevens family of that place.

He was educated at St. Paul's School, Concord, N. H., and at Columbia University.

After a year at Columbia he joined the construction company then building the West Shore Railroad. He later became a surveyor and worked in Oregon with the Oregon-Pacific Railroad. He returned to New Jersey in 1895.

Mr. Stevens began to study law in the office of his brother Frederic, who later became a Vice Chancellor. He was admitted to the bar in 1895 and became a counsellor in 1903.

Mr. Stevens was at one time a partner of the firm of Woodruff and Stevens, and specialized mainly in corporation law. He was a Special Master in Chancery.

He lived at 1158 Broad Street, Newark, and maintained an office until recently at 880 Broad St., Newark, N. J.

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Court Calls

ATLANTIC COUNTY

Sup & Cir (Weekly call) 139

Hon. Wilfred H. Jayne will hear Circuit Court Motions on Friday, May 31st at the Guarantee Trust Building, Atlantic City, N. J.

BERGEN COUNTY

Sup & Cir (Day call) 614
Com Pleas (Weekly call) 300

Hon. Edwin C. Caffrey will hear Circuit Court Motions on Friday, June 7th, at the Court House, Hackensack, N. J.

Hon. J. Wallace Layden will hear Common Pleas Motions on Friday, June 7th, at the Court House, Hackensack, N. J.

BURLINGTON COUNTY

There will be no trials of cases until the September, 1935 term.

Hon. Wilfred H. Jayne hears Circuit Court Motions every Friday, in the Court Room, Guarantee Trust Building, Atlantic City, N. J.

CAMDEN COUNTY

Sup & Cir (Weekly call) 70

Hon. V. Claude Palmer will hear Circuit Court Motions on Friday, June 7th, at the Court House, Camden, N. J.

CAPE MAY COUNTY

There will be no trials of cases until September 10, 1935.

Hon. Wilfred H. Jayne hears Circuit Court Motions every Friday, in the Court Room, Guarantee Trust Building, Atlantic City, N. J.

CUMBERLAND COUNTY

There will be no trials of cases until September 24, 1935.

ESSEX COUNTY

Sup & Cir (Weekly call) 1858
Com Pleas (Weekly call) 638

Hon. Worrall F. Mountain will hear Circuit Court Motions on Friday, June 7, 1935 at the Court House, Newark, N. J.

Hon. Richard Hartshorne will hear Common Pleas Motions on Friday, June 7, 1935 at the Court House, Newark, N. J.

The Commercial Calendar for June, will be published on June 5th, called on Friday, June 7th with trials starting Monday, June 10th.

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GLOUCESTER COUNTY

Sup & Cir (Day call) 34

Hon. Samuel M. Shay will hear Circuit Court Motions on Friday, June 7th, in Camden.

HUDSON COUNTY

Supreme (Weekly call) 561
Circuit (Weekly call) 400
Common Pleas (Weekly call) 1000

Hon. Henry E. Ackerson will hear Circuit Court Motions on Friday, June 7th, at the Court House, Jersey City, N. J.

Common Pleas Motions can be heard on any Friday by Judges hearing Civil Cases during the Term (Hon. Robert V. Kinkead and Hon. James R. Erwin).

HUNTERDON COUNTY

There will be no trials of Supreme & Circuit Court cases until the opening of the new term.

There will be no Common Pleas Cases heard until July 8, 1935, when Jury will return.

MERCER COUNTY

Sup & Cir (Weekly call) 80

Hon. A. Dayton Oliphant will hear Circuit Court Motions on Friday, June 7th, at Trenton.

MIDDLESEX COUNTY

Com Pleas (Weekly call) 35

Hon. Adrian Lyon hears Common Pleas Motions every Friday, at the Court House, New Brunswick.

Trials of Supreme & Circuit Court Cases will start on June 3rd.

Hon. Frank L. Cleary will hear Circuit Court Motions on Friday, June 7th, at the Court House, New Brunswick, N. J.

MONMOUTH COUNTY

Court is not sitting at present. Trials of Circuit Court Cases will be resumed on June 17th.

MORRIS COUNTY

Sup & Cir (Day call) 42

Hon. Newton H. Porter will hear Circuit Court Motions on Friday, May 31st and also on June 7th, at the Court House, Morristown, N. J.

OCEAN COUNTY

There will be no trials of cases until September 17th, which is the opening day of the term.

Hon. Russell G. Conover hears Common Pleas motions every Friday.

PASSAIC COUNTY

Sup & Cir (Weekly call) 810
Com Pleas (Day call) 71

Hon. Newton H. Porter will hear Circuit Court Motions on Saturday, June 8th, at the Court House, Paterson, N. J.

Kindly note that only Supreme & Circuit Court cases are being heard by Hon. Joseph A. Delaney.

SALEM COUNTY

There will be trials of cases in the Supreme & Circuit courts until the September Term.

There are only four cases in the Common Pleas Court and they will be tried on a day or days to be set.

SOMERSET COUNTY

Trials in the Supreme and Circuit Courts will begin on June 3rd.

Hon. Rulif V. Lawrence will hear Circuit Court Motions every Friday while trying cases in Somerville.

SUSSEX COUNTY

There will be no trials of cases until the September Term which opens on September 17th.

Circuit Court Motions are heard by Hon. Newton H. Porter at the Court House, Paterson, N. J.

Common Pleas Motions are heard by Hon. John C. Losey on the first and third Fridays of each month and at such other times and places as may be designated by appointment.

UNION COUNTY

Sup & Cir (Weekly call)
1155 Old list
143 New list
Com Pleas (Weekly call)
201 New list

Hon. Frank L. Cleary will hear Circuit Court Motions on Friday, June 7th, at the Court House, New Brunswick, New Jersey.

Hon. Edward A. McGrath hears Common Pleas Motions every Friday, at the Court House, Elizabeth, N. J.

WARREN COUNTY

Hon. Rulif V. Lawrence will try Supreme & Circuit Court Cases until May 31st.

Each Friday morning, while sitting in the above County, Hon. Rulif V. Lawrence will hear motions. At other times, arrangements may be made by correspondence with home address: 115 West Main Street, Freehold, N. J.

CHANCERY CALENDAR

The Chancellor will hear motions at Trenton, ever Tuesday.

A Vice Chancellor sits at Union County Court House, at Elizabeth, every Monday morning for the purpose of hearing Chancery motions.

V. C. Berry will hear motions at Newark on Tuesday, June 18. V. C. Berry also hears motions in Long Branch every Thursday.

V. C. Bigelow will hear motions at Jersey City on Monday, June 3.

V. C. Buchanan will hear motions at Newark on Tuesday, June 4.

V. C. Davis hears motions at Camden every Monday morning.

V. C. Egan will hear motions at Jersey City on Monday, June 3.

V. C. Fielder will hear motions at Jersey City on Monday, June 10. He may be reached at his office at 1 Exchange Place, Jersey City.

V. C. Lewis will hear motions at Hackensack on Monday, June 3.

V. C. Sooy hears motions at Atlantic City on every Tuesday morning.

V. C. Stein will hear motions at Newark on Tuesday, June 11.

ADVISORY MASTERS

A. M. Backes hears motions at Trenton every Tuesday morning.

A. M. Campbell hears motions at Hackensack every Tuesday morning.

A. M. Child will hear motions at Newark on Tuesday, June 25.

A. M. Grosman will hear motions at Newark on Tuesday, June 11. He may be reached at his chambers, 24 Commerce street, Newark, N. J.

A. M. Herr will hear motions at Newark on Tuesday, June 18. He may be reached at 1 Newark street, Hoboken, N. J.

A. M. Knight hears motions at Atlantic City on the 1st, 2nd and 3rd Monday of every month. Motions are also heard at chambers 432 Market street, Camden.

A. M. Kraft hears motions at Camden on every Monday morning.

A. M. Matthews will hear motions at Newark on Tuesday, June 4.

A. M. Rogers hears motions at Trenton every Tuesday morning.

A. M. Stafford will hear motions at Paterson on Monday, June 10.

A. M. Stanton will hear motions at Jersey City on Friday, June 7.

A. M. Trapp will hear motions at District Court Room, Phillipsburg, on Wednesday, June 12.

A. M. Van Winkle will hear motions at Jersey City on Friday, June 14.

District Courts

Approximate highest numbers reached in the District Courts this week:

1st NEWARK—Hon. Cecil H. MacMahon—Clerk Louis Hecht—Contract No. 180400. Tort No. 178200.

2nd NEWARK—Hon. Louis R. Freund—Clerk James E. Garrigan—No. 67825.

EAST ORANGE—Hon. Harry W. Lindeman—Clerk Dennis L. Conroy—No. 83295.

ORANGE—Hon. William A. Calhoun—Clerk Harold J. Trabold—Contract No. 48694. Tort No. 48648.

MONTCLAIR—Hon. Henry W. Trimble—Clerk Louis F. Brickett—Contract No. 33800. Tort No. 32333.

IRVINGTON—Hon. Ferdinand D. Masucci—Clerk J. Edward DeLaney—No. 45800.

1st JERSEY CITY—Hon. Frank H. Eggers—Clerk E. Frances Marron—No. 234800.

2nd JERSEY CITY—Hon. Philip W. Grece—Clerk Edward J. Poynton—No. 109897.

BAYONNE—Hon. Aaron Niker—Clerk Gustave F. 78710.

HOBOKEN—Hon. Jos berg—Clerk Harry Be tract No. 65475. Tort

UNION CITY—Hon Umansky—Clerk Henry No. 62800.

PASSAIC—Hon. Pete retti—Clerk Dominick D. 101-603.

1st PATERSON—Hon Hinchcliffe—Clerk Fra No. 156-400.

2nd PATERSON—Hon Rosenstein—Clerk Henr No. 18-284.

CLIFTON—Hon. Karp—Clerk Mrs. Ma Avoy—No. 15-215.

ENGLEWOOD—Hon Vander Burgh—Clerk Moloney—No. 28200.

EAST RUTHERFO James S. Ely—Clerk castro—No. 28565.

HACKENSACK—Hon White—Clerk Arthur S No. 45525.

RIDGEWOOD—Hon Cross—Clerk Frederick No. 10660.

WESTWOOD—Hon D. Lloyd—Clerk Peter No. 9133.

ELIZABETH—Hon. Sauer—Clerk George J 6087.

UNION—Hon. Elvin —Clerk Stanley K 7092.

SUMMIT—Hon. John —Clerk Anton C. Swens

PLAINFIELD—Hon Lyness—Clerk Robert No. 17-26.

LINDEN—Hon. mann, Jr.—Clerk Ralph —No. 5890.

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